

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 16, 2012

v

ROBERT CARL SULLIVAN,

No. 298601
Wayne Circuit Court
LC No. 09-005498-03-FC

Defendant-Appellant.

Before: WILDER, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, and sentenced to 57 months to 10 years' imprisonment. He appeals by delayed leave granted. We affirm.

Defendant's convictions arise from his participation with four other individuals in the February 2009 assault of Brian Marko in Detroit. The evidence indicated that Marko attended a house known for prostitution and drug trafficking. After engaging in drug use at the house throughout the night, Marko went home to obtain more money. When he returned, he hid \$200 to \$300 inside his pants. Upon returning, Marko was taken to the basement where he was tied up, punched in the face, and shot in the knee by a group of people who demanded money from him. After a ransom pickup from Marko's relative failed, Marko was forced to undress, exposing the hidden money in his pants. Marko was thereafter driven to a bank to withdraw additional money, but managed to escape from the vehicle.

At trial, Marko identified defendant as one of the participants in the offense. He stated that defendant participated by tying him up and punching him in the face with his fists. Defendant did not deny participating in the offense, but presented a defense of duress. He testified that he was highly intoxicated, forced to participate in the assault, and was threatened and mistreated by the other participants.

I. CROSS-EXAMINATION

One of the other participants, Tinykqua Walker, pleaded guilty to armed robbery, kidnapping, and felony-firearm, pursuant to a plea agreement whereby additional charges were dismissed and she agreed to cooperate and testify truthfully against the other codefendants.

Defendant now argues on appeal that the trial court erred by prohibiting him from questioning Walker about the possible maximum penalty of life imprisonment that she faced before she entered into the plea agreement. Defendant also argues that the improper limitation on cross-examination denied him his constitutional right of confrontation.

Although defendant argued below that testimony concerning the maximum penalty that Walker avoided by entering in the plea agreement was relevant to show her motivation for testifying, he did not argue that the limitation on cross-examination affected his constitutional right of confrontation. Accordingly, defendant's constitutional claim is not preserved. An objection on one ground is insufficient to preserve an appellate challenge based on a different ground. *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003). This Court reviews defendant's preserved evidentiary issue to determine whether the trial court abused its discretion by limiting the scope of defendant's cross-examination. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). Defendant's unpreserved constitutional claim is reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

This Court has held that it is an abuse of discretion for a trial court to deny cross-examination of a witness regarding the details of a plea agreement, including sentencing considerations received in exchange for testimony, because such evidence is relevant to the witness's credibility. *People v Mumford*, 183 Mich App 149, 153-154; 455 NW2d 51 (1990). However, any improper limitation in this regard is subject to a harmless error analysis. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995), citing *Delaware v Van Arsdall*, 475 US 673, 684; 106 S Ct 1431; 89 L Ed 2d 674 (1986), and *Crane v Kentucky*, 476 US 683, 692; 106 S Ct 2142; 90 L Ed 2d 636 (1986). A preserved nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative. MCL 769.26; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Any error in precluding defendant from inquiring into the maximum possible penalty that Walker avoided by entering her plea agreement was harmless. The jury was presented with substantial evidence challenging Walker's credibility, bias, and motivation for testifying against defendant. It was informed that Walker was an admitted drug trafficker who shot Marko, and that she willingly participated in his assault, kidnapping, and robbery. Walker's testimony also disclosed that she agreed to testify against defendant pursuant to a plea agreement that allowed her to avoid significant additional charges. In addition, although the jury was not informed of the possible maximum penalty that Walker avoided by pleading guilty, it was informed that she received a total minimum sentence of seven years and that she was facing a minimum sentence of between 135 months and 18 years, plus two additional years, before pleading guilty. A copy of the plea agreement between Walker and the prosecution was also admitted into evidence. Thus, the jury was fully aware that Walker's plea agreement allowed her to avoid the possibility of substantial additional punishment. Against this backdrop, it is not more probable than not that the jury would have viewed Walker's testimony differently if it had been informed that, by pleading guilty, she avoided a possible maximum penalty of life imprisonment. Thus, any error was harmless. For these same reasons, defendant has not established that any constitutional error affected his substantial rights. *Carines*, 460 Mich at 763-764.

II. SENTENCING

Defendant next argues that because the jury acquitted him of all weapon-related offenses, the trial court erred by scoring 25 points for offense variable (OV) 1, and five points for OV 2 of the sentencing guidelines. We disagree. “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision “for which there is any evidence in support will be upheld.” *Id.* (citation omitted). The proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo.” *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

MCL 777.31(1)(a) directs a score of 25 points for OV 1 if a “firearm was discharged at or toward a human being.” The instructions for OV 1 state that “[i]n multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points.” MCL 777.31(2)(b). For OV 2, the trial court should score five points if the “offender possessed or used a pistol[.]” MCL 777.32(1)(d). Similar to OV 1, the instructions for OV 2 provide that “[i]n multiple offender cases, if 1 offender is assessed points for possessing a weapon, all offenders shall be assessed the same number of points.” MCL 777.32(2). Thus, the trial court properly determined that it was required to score OV 1 and OV 2 in accordance with the codefendants’ scores for those variables.

Moreover, even if the trial court had erred in scoring OV 1 and OV 2, resentencing would not be required. If OV 1 and OV 2 were both scored at zero points, defendant’s total OV score would decrease from 105 to 75 points. Even with this scoring adjustment, defendant remains in the same OV level VI (75 or more points), and his guidelines range does not change (29 to 57 months). MCL 777.65. Because the alleged scoring errors do not affect the appropriate guidelines range, defendant would not be entitled to resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

III. DEFENDANT’S STANDARD 4 BRIEF

Defendant raises several additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

Defendant argues that the trial court violated MCR 2.516(B)(1) when it failed to instruct the jury on the seven felony charges against him during its preliminary instructions to the jury. Because defendant did not challenge the preliminary instructions below, this Court reviews this unpreserved claim for plain error affecting defendant’s substantial rights. *Carines*, 460 Mich at 763-764.

MCR 2.516(B)(1) requires a trial court to give the jury certain preliminary instructions after the jury is sworn and before testimony is taken. MCR 6.412(B) similarly provides that “[b]efore beginning the jury selection process, the court should give the prospective jurors appropriate preliminary instructions” The comment to MCR 6.412(B) states that appropriate preliminary instructions may be found in the Michigan Criminal Jury Instructions. CJI2d 1.8 instructs the court to read an information in a criminal trial so that the defendant and

jury can hear the charges. Here, the trial court instructed the jury in accordance with CJI2d 1.8 when it gave the following instruction as part of its preliminary instructions:

This is a criminal case and the paper used to charge the defendant with a crime is called an Information. The Information in this case charges the Defendant Robert Carl Sullivan as follows:

Assault with intent to rob while armed. Did make an assault upon Brian Marko with intent to rob and steal while being armed with a dangerous weapon, or article used or fashioned in a manner to lead the person assaulted to reasonable believe it to be a dangerous weapon.

Count 2, Robbery Armed. Did in the course of committing a larceny of money, use force or violence against a person present, and/or assault or put in fear a person present, Brian Marko, and in the course of that conduct possessed a gun, a dangerous weapon;

Count 3, Kidnapping. Did knowingly restrain Brian Marko with the intent to hold that person for ransom or reward;

Count 4, Extortion. Did maliciously threaten or injure the person of Brian Marko, with the intent to extort money or any pecuniary advantage whatever, or to compel the person so threatened or to do or refrain from doing an act against his will;

Count 5, Assault with intent to do great bodily harm less than murder. Did make and [sic] assault upon Brian Marko with intent to do great bodily harm less than the crime of murder;

Count 6, Assault with a dangerous weapon. Did make an assault upon Brian Marko with a dangerous weapon, to wit: A handgun, but without intending to commit the crime of murder or to inflict great bodily harm less than the crime of murder;

Count 7, Felony Firearm. Did carry or have in his possession a firearm, to wit: a handgun at the time he committed or attempted to commit a felony, to wit: Assault with intent to rob while armed, and/or assault with intent to [sic] murder, and/or extortion, and/or assault with intent to commit great bodily harm.

The defendant has pled not guilty to these charges. You should clearly understand that the Information I have read is not evidence. An Information is read in every criminal trial so the defendant and the jury can hear the charges.

Defendant does not cite any authority indicating that the court was also required to instruct the jury on the elements of each offense during the preliminary instructions. Contrary to defendant's assertion, the jury was not left without guidelines for evaluating the evidence presented at trial. The trial court properly instructed the jury on the elements of each charge before the jury began deliberations, and defendant does not challenge those instructions.

Defendant has failed to demonstrate a plain error, let alone a structural error requiring automatic reversal. *Carines*, 460 Mich at 763-764.

We also reject defendant's related unpreserved argument that the prosecutor's conduct somehow contributed to the allegedly improper preliminary instructions. As previously indicated, the trial court's instructions were consistent with the court rules and the standard jury instructions, and were not improper. Defendant fails to explain how the prosecutor's conduct otherwise violated his right to a fair trial and. Accordingly, he has failed to establish plain error. *Carines*, 460 Mich at 763-764.

Similarly, we find no merit to defendant's alternative claim that defense counsel was ineffective for failing to ensure that the jury was properly instructed. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent from the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). As previously discussed, the trial court's preliminary instructions were not improper. Therefore, defense counsel's failure to challenge the instructions was not objectively unreasonable. Counsel was not required to advocate a futile position. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio